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Supreme Court, U.S.
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No. 93-1549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF WESTCHESTER, NEW YORK,

Petitioner,

vs.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CONVENT OF THE SACRED HEART'S BRIEF IN OPPOSITION

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41 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit violate the grant of diversity jurisdiction to the United States District Courts contained in 28 U.S.C. § 1332 by adopting the Connecticut Supreme Court's holding, in response to certified questions, that based on the certified record on appeal Petitioner County of Westchester was not entitled to summary judgment declaring as a matter of Connecticut law that it had obtained air navigation and obstruction clearance easements by prescription over Respondents' property in the State of Connecticut?

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COUNTERSTATEMENT OF THE CASE

A. Factual Background

For over one hundred years trees have been growing on the hillside now owned by Respondent Convent for the Sacred Heart (the "Convent") in Greenwich, Connecticut, across King Street from the New York State boundary line. Some of these trees, still present on the Convent's property, were 20 years old by the time the Wright brothers successfully completed the first powered heavier-than-air flight at Kitty Hawk in 1903. More trees were planted on the same hillside by Henry Steers in 1908 when the property was relandscaped during construction of the estate residence now used by the Convent as a school. These trees, too, are still on the site.

These trees on the Convent's property were mature trees by the year

1942, when the United States Civil Aeronautics Administration and Army Corps of Engineers began construction of an airport (the "Airport") across the state boundary in Westchester County, New York. Also in 1942, the Convent acquired its property for use as a boarding school for girls. Although the Civil Aeronautics Administration constructed one runway (now known as "Runway 11/29") pointed directly at the wooded hill, it neither sought nor obtained any easements or rights to cut trees from the Convent. In late 1943, the Airport was turned over to the County of Westchester for use as a municipal airport.

The hill on the Convent's property rises to a height of 442 feet above sea level. This is fifty-four feet higher in altitude than the elevation indicated for the closest end of Runway 11/29 -- so

that the ground level is at the equivalent height of a five-story building located at the end of the runway.

Not surprisingly, the mature trees on the Convent's property have obstructed the approach to Runway 11/29 from the time of the Airport's opening. Although the Federal Aviation Administration ("FAA") requires an airport to maintain a clear "approach surface" rising at a twenty-to-one slope from a point 200 feet beyond the threshold of a runway, a series of official United States government obstruction charts for the Airport show tree obstructions in this approach surface for Runway 11/29 in 1949, 1963, 1970, 1981, and 1990. Nevertheless, the trees, the Convent, and the Airport coexisted for decades, with pilots approaching runway 11/29 from the

east making the steep landing approaches necessary to give the trees an adequate margin. This steeper runway approach also kept the approach path over the Convent's property sufficiently high that, although the noise of the airplanes was an annoyance, the overflights did not interfere with or prevent the Convent from operating its school.

In 1969, the FAA alerted the Airport to potential tree obstruction problems in the approach to Runway 29. Petitioner took no action. During 1979, the Airport sought to install a visual approach slope indicator ("VASI") system for Runway 29 and discovered that the trees already present on the Convent Property prevented the VASI installation because the trees interfered with an approach slope well above the three degree slope upon which the approach surface plane is based.

Although the Convent declined Petitioner's request to trim trees, Petitioner took no further action, and did not assert any preexisting right to clear trees. Commencing in 1981, the FAA sent the Airport a series of increasingly urgent notices to correct the tree obstructions in the Runway 29 clear zone and directed the Airport to take action to remedy the problem. Still, Petitioner took no action. During this time, the Convent undertook costly plans to expand its educational facilities, relying on its right as owner of the property to maintain the landscaped, wooded setting appropriate for an educational institution.

Finally, at the end of 1988, nearly twenty years after the FAA first advised the Airport of its tree obstruction problems on the approach to Runway 29,

the Airport displaced the threshold of Runway 29 in order to bring the runway into compliance with FAA requirements. With the displacement of the threshold, Runway 29 now meets FAA standards and requirements for clearance of the approach zone, and is considered safe. Only after the FAA displaced the threshold did Petitioner commence this lawsuit seeking a declaration that it had the right to trim trees on the Convent's property and a prohibition against any use of the hillside more than two feet above ground level.

Runway 11/29 is the smaller of two runways currently operating at the Airport. The other runway, Runway 16/34 is oriented in a north-south direction, and is 6,550 feet in length. This longer runway, Runway 16/34, is the Airport's primary runway, and is the only runway

that is usable by air transport jet aircraft, even with Runway 11/29 at full length. Runway 11/29 is oriented in an east/west direction, and, prior to 1989, was 4,451 feet in length. Runway 11/29 is used as an alternate "crosswind" runway for some smaller aircraft under certain wind conditions. If the Airport were unable to cut or trim the Landowners' trees, its commercial operations would not be much impaired.

B. Procedural Background

Petitioner commenced this lawsuit in 1990. The Complaint sought an injunction against the Convent and other Connecticut landowners, requiring them to permit the removal of those trees on their properties whose height prevented the Airport from complying with FAA requirements for runway landing approaches. Lacking the authority to

condemn property rights in another State, Petitioner sought the equivalent relief (but without the requirement for compensation) on common law theories of prescriptive easement and nuisance, the federal declaration of navigable airspace in the Civil Aeronautics Act ("CAA"), 49 U.S.C. § 1301 et seq., and interference with a claimed constitutional right of interstate commerce. All parties agree that the Petitioner's common law claims are governed by Connecticut law.

On September 10, 1990, the District Court granted the respondents' motions to dismiss all of the federally based claims and the claims asserted against the Connecticut Commissioner of Transportation, but denied the motions with respect to Petitioner's Connecticut common law claims. County of Westchester v. Town of Greenwich, 745 F. Supp. 951

(S.D.N.Y. 1990). Each of the respondent landowners answered and interposed counterclaims seeking, in the alternative, inverse condemnation damages for loss of valuable property rights in the event that the District Court were to find that the Airport could prevent the landowners from growing trees or making any other use of their property within the airspace claimed by the Airport. The District Court granted Petitioner's motion to dismiss respondent landowners' inverse condemnation counterclaims on February 12, 1991. County of Westchester v. Town of Greenwich, 756 F. Supp. 154 (S.D.N.Y. 1991).

Following completion of discovery, the landowner respondents (except for respondent Laurelton Convalescent Home) moved for summary judgment on the Petitioner's common law prescriptive

easement and nuisance claims. Petitioner cross-moved for summary judgment. On June 2, 1992, the District Court granted the Petitioner's cross-motion for summary judgment in part. The District Court held that Petitioner had established a right to a prescriptive air navigation (or "avigation") and obstruction clearance easements as a matter of Connecticut law. The District Court granted the Airport an "injunction to cut back, at its own expense, the trees occupying Runway 11/29's clear zones to the heights they attained as of February 1975." Respondent landowners moved the District Court to certify the question whether and to what extent Connecticut law recognizes a prescriptive easement for air navigation and obstruction clearance for immediate appeal pursuant to 28 U.S.C. § 1292(b). The District

Court so certified, and the United States Court of Appeals for the Second Circuit then accepted the interlocutory appeal.

In an order dated January 6, 1993, the United States Court of Appeals for the Second Circuit certified the question of whether Connecticut would recognize a prescriptive easement for air navigation and obstruction removal to the Connecticut Supreme Court. The Second Circuit certified three questions:

> 1. Can an avigation easement be acquired by prescription in the State of Connecticut?
>
> 2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?
>
> 3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include

whatever air space is necessary to use the easement?

The Connecticut Supreme Court accepted the certified questions, and the Second Circuit transmitted the record to the Connecticut Supreme Court for its review. On July 28, 1993, the Connecticut Supreme Court responded to the first certified question by holding that Connecticut law would not recognize a prescriptive avigation easement in Petitioner's favor under the circumstances revealed by the record in this case. This response to the first certified question obviated any need to answer the second and third certified questions.

Petitioner then moved the Second Circuit to reject the Connecticut Supreme Court's statement of Connecticut law. The Second Circuit denied this motion in

an opinion dated November 10, 1993, in which it adopted the Connecticut Supreme Court's answer to the certified questions, and reversed and remanded the District Court's grant of partial summary judgment to Petitioner. Petitioner moved for rehearing by the Second Circuit. The Second Circuit denied the motion for rehearing. Petitioner's Petition to this Court for Certiorari followed.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. Petitioner Has Identified No Reason to Grant Certiorari.

Contrary to Supreme Court Rule 14(j), Petitioner has pointed to none of the reasons set forth in Supreme Court Rule 10 for grant of a writ of certiorari in this case. Petitioner points to no conflict between the decision of the Second Circuit adopting Connecticut's

response to the questions certified and the decision of any other United States Court of Appeals. Petitioner does not "at this point" argue that the decision of the Connecticut Supreme Court contravenes controlling "federal common law." Petition at 43. Petitioner does not assert that the procedure followed by the Second Circuit Court of Appeals so deviated from normal procedure as to require an exercise of this Court's supervisory powers. Rather, Petitioner relies solely on an imagined threat to the entire national air transportation system due to the shortening of one runway at Petitioner's municipal airport.

The existence of such a grave threat to the national air transportation system evaporates in light of the fact that the Runway 11/29 threshold has now been displaced for five years, without any

apparent harm to the Republic. Petitioner has explicitly acknowledged that it has filed this lawsuit as a substitute for condemnation proceedings, which are unavailable to it as a New York municipality seeking to abrogate Connecticut property rights.[1] This Court long ago noted that Congress made a decision not to condemn the property rights necessary for clear airport approaches by federal fiat or by federal judicial process, but to leave the responsibility for acquiring property

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[1]Petitioner goes so far as to suggest that the District Court "granted the County a prescriptive avigation easement over respondents' lands," Petition at 18, as if the District Court had the authority to condemn and "grant" property rights, without compensation. Of course, all the District Court has the authority to do is to declare the rights of the parties under applicable State law -- and the parties agree that the applicable law is that declared by Connecticut Supreme Court.

rights in the laps of the local airport owner. Griggs v. County of Alleghany, Pennsylvania, 369 U.S. 84, 89-90 (1962). If the threat posed by Respondents' trees in this case were as grave a threat to the national air transport system as Petitioner supposes, then Congress could step in with special legislation to condemn the rights necessary to operate that system. Petitioner offers no reason why this Court should become the Supreme Court of property condemnation in the absence of such Congressional action.

B. Restatement of the Questions Certified Does Not Vitiate the Connecticut Supreme Court's Response.

Certification is a useful procedure in diversity cases where state law principles determine the outcome of a case and the relevant state law principles are not settled.

Certification allows a federal court to obtain an authoritative statement of the governing state law, as applied to the facts of the pending case. At the suggestion of the Attorney General of the State of Connecticut, the Second Circuit adopted the certification route "as prudent counsel" in this case, noting that "there appears to be little law anywhere directly addressing the particular rights at issue here." January 6, 1993 Second Circuit Opinion, Petition Appendix at A-168. Accordingly, in its order dated January 6, 1993, the Second Circuit certified the questions stated above to the Supreme Court of the State of Connecticut, and directed the clerk to transmit a certificate of the questions certified, together with "a complete set of the briefs, appendix, and record filed by the parties in this

court." Petition Appendix A-159 (emphasis added).

Petitioner now protests that because the Connecticut Supreme Court answered the first certified question "under the[] circumstances" of this case rather than in the abstract, its answer may be ignored as no answer at all. This proposition is ludicrous. Courts, both federal and state (including courts in Connecticut) decide cases on the basis of an actual dispute between parties, not on abstract, hypothetical questions of law. See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937); Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951). There would be no point in certifying the entire record on appeal to the Connecticut Supreme Court if it was not to be permitted to look at the factual

context and record under which this appeal arose; moreover, a request for a response to an abstract question divorced from the record would not present a justiciable controversy that the Supreme Court of Connecticut would be capable of hearing and deciding.

Petitioner cites no authority whatsoever for the proposition that a receiving court's insistence on answering a certified question under the particular circumstances of the record certified vitiates the authority of its decision, and counsel is aware of none.[2] To the contrary, the federal reporters are full of federal decisions conforming to state court responses to certified questions

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[2]Indeed, counsel is aware of no case anywhere in which a federal court, after certifying questions to a state court and receiving an answer, declined to follow the answer of the state court.

where the state court specifically considered the questions in the light of the record of the particular case. See, e.g., Boyd v. Bulala, 905 F.2d 764, 767 (4th Cir. 1990) ("[a]s applied to the facts found in this case"); Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 200, 551 N.Y.S.2d 481, 483 ("answer to the certified question depends on an analysis of New York's public policy and an application of that policy to the circumstances here."), answer to certified question conformed to, 902 F.2d 1111 (2d Cir. 1990).

Petitioner also complains that the Connecticut Supreme Court, by rephrasing the certified question to limit the response to the circumstances actually presented, somehow undercuts the authority of the response. This contention, too, is without any support,

and is contrary to authority. State Court answers to certified questions are routinely followed where the answering court has rephrased the question certified. See Insinga v. LaBella, 876 F.2d 883 (11th Cir. 1989); Toner v. Lederle Laboratories, 828 F.2d 510 (9th Cir. 1987), cert. denied, 485 U.S. 942 (1988). Indeed, federal courts certifying questions to state courts have emphasized that the answering court retains discretion to rephrase the question certified based on its review of the record before it. See Morrell Constr., Inc. v. Home Ins. Co., 899 F.2d 875, 878 (9th Cir. 1990); Martinez v. Rodriquez, 394 F.2d 156, 159 n.6 (5th Cir. 1968).

Far from presenting any cert-worthy question of conflicting procedure, the procedure followed by the Second Circuit

and the Connecticut Supreme Court, including the transmission of the entire record and review of the issues of Connecticut law based upon the concrete record in this case, is in line with every reported decision dealing with certification of questions of State law of which counsel is aware.

C. As the District Court's Grant of Summary Judgment as a Matter of Law Involved No Findings of Fact, the Connecticut Supreme Court's Contrary Application of Connecticut Law to the Record Did Not Improperly Usurp any Federal Right to Federal Factfinding in Diversity Cases.

Petitioner's main beef with the procedure followed is Petitioner's claim that the Connecticut Supreme Court somehow "usurped the authority of the federal district court to make findings of fact, and made several which in effect 'reversed' the findings of the district court." Petition at 35. This assertion

misrepresents the procedural posture of this case both before the District Court and before this Court: there has been no trial, and thus no determination of any disputed "question of fact" by any court or jury.[3] The District Court judgment appealed from, and the record certified to the Connecticut Supreme Court, was on cross-motions for summary judgment. See United States v. One Tinteretto Painting, 691 F.2d 603 (2d Cir. 1982) (role of court on summary judgment motion is issue finding, not fact finding).

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[3]Nowhere in its Statement of the Case does the Petition even inform this Court that the District Court decision appealed from was a decision to grant partial summary judgment to Petitioner. Instead, Petitioner seeks to create the misimpression that the District Court held a trial and made a "scrupulous examination of the facts and the law" before "grant[ing] the County an easement." Petition at 18.

The Connecticut Supreme Court's decision was made based on its own careful search of the record for any facts that would establish (as was Petitioner's burden) that the use of airspace above respondents' properties sufficiently interfered with the defendants' use and enjoyment of their properties to constitute an actionable adverse use. See Connecticut Supreme Court Opinion, Petition Appendix at A-178 - A-180. Contrary to Petitioner's contention, the Connecticut Supreme Court's resolution of this issue was its application of the "adversity" element of prescription under Connecticut law, not judicial factfinding. The District Court's opposite legal conclusion, that a use could be adverse simply because it might sometime in the future interfere with the landowners' continued use, was

properly rejected by the Connecticut Supreme Court as an incorrect statement of Connecticut law.

The Connecticut Supreme Court could not possibly have reversed "findings" of fact by the District Court: on a summary judgment motion the District Court should not have been making any findings of disputed issues of fact. See One Tintoretto Painting, supra. Moreover, to the extent that the Congressional grant of diversity jurisdiction in 28 U.S.C. § 1332 implies a federal "right" to federal court oversight of "factfinding" (or, more properly, issue determination) in diversity cases, this interest was in fact preserved in this case by the Second Circuit's own retention of jurisdiction over the appeal and review of Petitioner's claims on its motion to reject the answer to the certified

questions. Prior to applying the Connecticut Supreme Court's statement of applicable law, the Second Circuit satisfied itself that the Connecticut Supreme Court "applied Connecticut's adverse use requirement to the record supplied by the district court." Petition Appendix A-21. Thus, the Second Circuit's review assured that the Connecticut Supreme Court had stuck to the summary judgment record before it, and preserved any interest Petitioner might have in ensuring federal court impartiality in matters of issue determination on a summary judgment motion.

The Second Circuit's procedure in this case conformed to reported decisions in other circuits. For instance, in Tyler v. Insurance Co. of North America, 539 F.2d 1072 (5th Cir. 1976), the Fifth

Circuit rejected a gambit very similar to Petitioner's challenge to the Connecticut Supreme Court decision. In Tyler, the Fifth Circuit certified a state law question of insurance contract interpretation to the Alabama Supreme Court. When the state court reached a conclusion of law adverse to it, the appellee insurer sought to avoid the answer to the certified question on the grounds that the district court (in ruling on cross motions for summary judgment) had made factual determinations that precluded application of the rule of law enunciated by the state court. The Fifth Circuit rejected this line of attack:

> We reject this argument. Whatever the technical disposition by the District Judge, our disposition on appeal following consideration by the Alabama Supreme Court is the same. Any fact findings

> based on an erroneous legal standard cannot be credited. Battlestein Investment Co. v. United States, 5 cir., 1971, 442 F.2d 87, 89; Fulton National Bank v. Tate, 5 Cir., 1966, 363 F.2d 562, 566.

539 F.2d at 1074. Likewise, whatever "findings" the District Court might have purported to make about the adversity of Petitioner's aircraft overflights cannot stand given the Connecticut Supreme Court's conclusion that Connecticut law does not support the finding of an easement by prescription on this record.

Petitioner points to no contrary authority; nor does Petitioner offer any reason why a fact-bound inquiry into whether the Connecticut Supreme Court properly stuck to the record on cross-motions for summary judgment is worthy of this Court's attention.

D. The Connecticut Supreme Court's Application of Connecticut Law is Binding under Erie Railroad v. Tompkins.

Petitioner tries to argue that the Connecticut Supreme Court is incorrect in its application of Connecticut law, citing Connecticut decisions for its view of the "correct" statement of the Connecticut common law of prescriptive easements. Petition at 32-33. However, the "correct" principles of the Connecticut common law of prescriptive easements as applied to the unique circumstances of flights through the navigable airspace of the United States are not a matter for this Court to decide, having been settled by the Connecticut Supreme Court's decision of the certified questions on this appeal.

Federal courts sitting in diversity jurisdiction are bound to follow the

Connecticut Supreme Court's decision on this appeal as the most authoritative statement of applicable Connecticut law available, under the principle of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Erie, of course, made clear that federal courts are not free to ignore authoritative statements of applicable state law in diversity cases; to do so is "an unconstitutional assumption of powers by the Courts of the United States." Id. at 79 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910)).

A federal court is bound by a ruling of a State's highest court even though this decision might not be binding on the State court itself in a second appeal. Moore v. Illinois C.R. Co., 312 U.S. 630 (1941). Even if the decision of the Connecticut Supreme Court were merely considered dicta, it could not be ignored

by a federal diversity court as petitioner suggests. Kennel v. Carson City School Dist., 738 F. Supp. 376 (D. Nev. 1990). Thus, whether, the decision of the Connecticut Supreme Court is applied as law of the case, or simply as the most authoritative statement of the application of Connecticut law to the record of this case, Erie requires the result reached by the Second Circuit in this case. See Puckett v. Rufenacht, Bromagen, & Hertz, Inc., 949 F.2d 789, 790 (5th Cir. 1992).

Petitioner has specifically declined to ask this Court to adopt a federal common law of prescriptive avigation easements, Petition at 43, and appropriately so, as the determination of rights in real property within a State's borders is a quintessential matter of State sovereignty. Nevertheless,

Petitioner neglects to mention that even if federal common law were applied, the earliest case addressing the possibility of prescriptive rights to air navigation easements was a decision of the United States Court of Appeals for the Ninth Circuit, Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936), cert. denied 300 U.S. 654 (1937). Hinman squarely rejected the proposition that aircraft traveling through the navigable airspace of the United States under the federal declaration in the Civil Aeronautics Act could obtain prescriptive rights. The Hinman decision was cited with approval by this Court in its own seminal case deciding that landowners whose property is effectively taken by frequent low-altitude overflights can recover damages for inverse condemnation. United States v. Causby, 328 U.S. 256, 264 (1946).

The Connecticut Supreme Court's determination of Connecticut law governing prescriptive rights to air navigation easements is not only the last word on the subject under Erie Railroad, but is consistent with the only holding on the subject under federal common law as well. Petitioner has not asked this Court to reconsider the Erie Railroad decision; nor has it explained how this Court can otherwise revisit a question of Connecticut law upon which the Connecticut Supreme Court has spoken. There is no reason for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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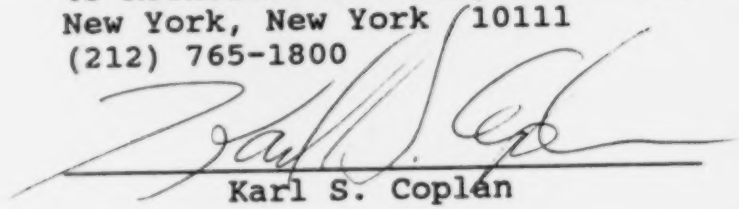

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